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IN THE

# Supreme Court of the United States

October Term, 1972

No. ..... 72-290

STATE OF CALIFORNIA,

*Petitioner,*

*vs.*

THOMAS HALPIN, REBECCA HALPIN, and MARTIN SILVA,

*Respondents.*

**On Writ of Certiorari to the Supreme Court of the State of California**

## PETITION FOR WRIT OF CERTIORARI


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**On Writ of Certiorari to the Supreme Court of the State of California**

## PETITION FOR WRIT OF CERTIORARI

Petitioner State of California respectfully prays that a writ of certiorari issue to review the judgment (peremptory writ of mandate) of the Supreme Court of the State of California entered in this proceeding on April 24, 1972, rehearing denied May 23, 1972.

### Opinions Below

The opinion of the California Supreme Court is reported as *Halpin v. Superior Court*, 6 Cal. 3d 885, 101 Cal. Rptr. 375, 495 P.2d 1295 (1972), and a copy of that opinion is set forth as Appendix A to this petition. A copy of the order of the California Supreme Court, denying petitioner's petition for a rehearing, is set forth as Appendix B. The prior opinion of the California Court of Appeal, Fourth Appellate

District, Division Two, is reported as *Halpin v. Superior Court*, 97 Cal. Rptr. 402 (1972) (vacated), and a copy of that opinion is attached as Appendix C to this petition. Pursuant to California practice, the opinion of the California Court of Appeal was vacated upon the grant of a hearing by the California Supreme Court.

**Jurisdiction**

The judgment of the California Supreme Court was entered on April 24, 1972. A timely petition for rehearing was denied on May 23, 1972, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

A state court judgment finally disposing of a writ of prohibition is a final judgment reviewable under 28 U.S.C. § 1257. *Madruga v. Superior Court*, 346 U.S. 556, 557 n. 1 (1954). This rule should logically extend to a state court judgment finally disposing of a writ of mandate (mandamus) as well.

**Questions Presented**

1. In search warrant proceedings, can a magistrate reasonably infer that an informant has the requisite personal knowledge of the commission of the crime from numerous factual details supplied by the informant and corroborated by a police investigation in virtually every particular except the actual presence of narcotics in the place where the informant had said they would be?

2. Did Congress intend by the enactment of the wire communications provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) to preempt state legislation

authorizing jailers and prison officials to monitor inmate telepone calls?

3. If Title III of the 1968 Crime Control Act supersedes state legislation authorizing jailers and prison officials to monitor inmate telephone calls, is Title III unconstitutional as thus applied because it unreasonably infringes California's exercise of the power, reserved to it by the Tenth Amendment, to regulate and administer the internal affairs of its penal institutions?

4. Did the monitoring of the telephone conversation between respondents Thomas and Rebecca Halpin come within the party consent exception found in 18 U.S.C. § 2511, subsection 2(c)?

**Constitutional Provisions Involved**

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment X:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

United States Constitution, Amendment XIV, section 1, in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of cit-

izens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## Statutes Involved

The statutes involved in this case are set forth in Appendix D to this petition.

## Statement of the Case

### A. Procedural Background

Respondents Thomas Halpin, Rebecca Halpin and Martin Silva were indicted by the San Bernardino County Grand Jury on three felony counts: (1) conspiracy to transport marijuana (Cal. Pen. Code § 182, subd. 1; Cal. Health & Saf. Code § 11531), (2) transportation of marijuana (Cal. Health & Saf. Code § 11531), and (3) possession of marijuana for sale (Cal. Health & Saf. Code § 11530.5).

In the Superior Court of the State of California for the County of San Bernardino, respondents moved to dismiss the indictment and to suppress evidence consisting of 500 pounds of marijuana and an incriminatory tape recording of a telephone conversation initiated by respondent Thomas Halpin to respondent Rebecca Halpin, his wife, from a telephone located within a San Bernardino County jail facility.[1] The superior court denied both motions.

Thereafter respondents sought a statutory writ of mandate (Cal. Pen. Code § 1538.5(i)), to compel the trial court to suppress the challenged evidence. The

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[1]With respect to this tape recording, California Penal Code section 851.5 required that the telephone call in question be made "in the presence of a public officer or employee."

California Court of Appeal, Fourth Appellate District, Division Two summarily denied the petition for the writ. The California Supreme Court granted a hearing and retransferred the matter to the Court of Appeal with instructions to issue an alternative writ of mandate.

Upon reconsideration of the petition for writ of mandate, the California Court of Appeal again denied the petition. *Halpin v. Superior Court*, 97 Cal. Rptr. 402 (1972) (vacated). A copy of this opinion is attached as Appendix C. Respondents again petitioned for a hearing in the California Supreme Court, which hearing was granted.

The California Supreme Court granted the peremptory writ of mandate sought by the respondents. It held that the search warrant issued in connection with the search which resulted in the seizure of the 500 pounds of marijuana was invalid because the oral testimony in support of the search warrant failed to satisfy the requirements set forth in *Aguilar v. Texas*, 378 U.S. 108 (1964). (6 Cal. 3d at 885-96, 101 Cal. Rptr. at 376-82, 495 P.2d at 1296-1302). The California Supreme Court also held that the tape recorded conversation between respondents Thomas and Rebecca Halpin was intercepted in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-20), which the Court held to have preempted the field of wiretapping and electronic surveillance. (6 Cal. 3d at 896-900, 101 Cal. Rptr. at 382-86, 495 P.2d 1302-06.)

On May 9, 1972, petitioner filed a petition for rehearing in the California Supreme Court. Thereafter on May 16, 1972, petitioner made application to the California Supreme Court for a stay of the issuance of

the peremptory writ of mandate pending certiorari proceedings within this Court. On May 23, 1972, the California Supreme Court denied both the petition for rehearing and the application for stay. (Appendix B.)

On June 16, 1972, Justice William O. Douglas of this Court ordered the commencement of trial in this case stayed pending the timely filing of the instant petition for a writ of certiorari.

### B. Statement of Facts[2]

Between 2:30 and 3:00 p.m. on December 14, 1970, Detective Cole of the Ontario Police Department and other police officers stopped a white and green 1971 Ford Sport Custom camper truck in the City of Ontario. The officers had had this camper under surveillance at the Havasu Camper Company in Ontario because Detective Cole had previously received in-

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[2]This statement of facts is based upon the transcript of oral proceedings, December 14, 1970, before Judge Roland C. Rutledge of the San Bernardino County Judicial Court District, and the reporter's transcript of proceedings before the 1971 San Bernardino County Grand Jury in support of the indictment returned February 3, 1971 against the respondents herein.

The oral testimony received by Judge Rutledge, sitting as a magistrate on December 14, 1970, comprises all of the evidence submitted in support of the oral application for a search warrant made in this case. California Penal Code section 1526, subdivision (b) provides for oral testimony in support of a search warrant as follows: "In lieu of the written affidavit required in subdivision (a), the magistrate may take an oral statement under oath with shall be recorded and transcribed. The transcribed statement shall be deemed an affidavit for purposes of this chapter."

The transcript of oral proceedings before Judge Rutledge will be denominated herein as "Mag. Tr." *All subsequent references to a search warrant affidavit in this case are references to this transcript.*

The reporter's transcript of grand jury proceedings in support of the indictment returned on February 3, 1971, will be denominated as "Gr. J. Tr."

formation that a camper of this description contained a large quantity of marijuana. Respondent Thomas Halpin was the driver of the truck. (Gr. J. Tr. pp. 7-10.)

After the camper came to a stop at the curb, respondent Thomas Halpin immediately left the vehicle from the driver's door. He closed the door very quickly behind him and locked it. (Gr. J. Tr. p. 10.) The police officers asked respondent Thomas Halpin to identify himself, which he did by producing a driver's license. The officers advised him that they had information that the camper contained a large quantity of marijuana. They asked for permission to search the vehicle, which he refused to give. Respondent Thomas Halpin was placed under arrest, and Detectives Cole and Bowlin left the scene of the arrest to obtain a search warrant. Other officers remained with respondent Thomas Halpin and the camper truck. (Mag. Tr. p. 11; Gr. J. Tr. p. 11.)

At 3:00 p.m. on December 14, Detective Cole appeared before Judge Roland C. Rutledge, sitting as a magistrate, to testify in support of an oral application for a search warrant. (Mag. Tr. pp. 1-2.) Detective Cole testified that, at approximately 8:05 a.m. on December 14, 1970, Captain Mooney of the Pomona Police Department ". . . called me, informing me that at a Havasu Trailer Company at 1515 West Holt I would find a 1971 Ford Sport Custom truck, white color with a dark green roof, and on this truck would be a 10½ foot Havasu camper cream color with a darker wood—simulated wood—panel. He informed me that the truck would have a temporary license in the rear window, giving me a number of 1291208. He stated that this camper body would be a false type

body and contained approximately $100,000 of marijuana. He stated that a white male known to him only as Tom [who apparently would be driving the camper] would be arriving in San Bernardino on a flight from San Diego. He described this male as approximately six foot and weighing 160 to 170 pounds. He stated that he had sandy hair, a moustache and wore horn-rimmed glasses." (Mag. Tr. pp. 4-5.) Captain Mooney also related that the camper truck would be parked next to a blue Chevrolet. Detective Cole then related that "I asked [Captain Mooney] about [the informant's] reliability, and he stated that on November 30 he had received similar information from this informant which he gave to the San Francisco Police Department, which resulted in an arrest. At this time a Havasu camper was loaded similar to the one he described here and contained [a very large haul of] marijuana." (Mag. Tr. p. 5.)

Detective Cole further testified before the magistrate that after receiving this information he drove to the Havasu Trailer Company and, that about 8:40 a.m., he observed the truck described by Captain Mooney in the company's lot. (Mag. Tr. pp. 4, 5-6.) The camper was parked next to a blue Chevrolet. After discovering the camper described by Captain Mooney's informant, Detective Cole called the Sheriff's Narcotics Division for assistance. The truck was placed under surveillance. (Mag. Tr. p. 6.) At 11:30 a.m., a Volkswagen automobile drove into the camper lot. The frame around the license plate bore the name of a San

Diego car dealer and the man in the car [respondent Thomas Halpin] fit the description earlier given to Detective Cole. A female [apparently respondent Rebecca Halpin] and an infant were passengers in the Volkswagen. Once inside the camper lot, respondent Thomas Halpin left the automobile and went into the trailer company office. Shortly thereafter he returned to the Volkswagen and drove away. The police officers followed Halpin's Volkswagen for the next two hours but discontinued the surveillance when respondent Thomas Halpin took actions to determine whether someone was following him. The officers abandoned the vehicular surveillance and returned to their positions near the Havasu Trailer Company. (Mag. Tr. pp. 7-10.)

At about 2:30 p.m., the Volkswagen returned to the camper lot. Respondent Thomas Halpin got out of the car and went into the trailer company. About eight minutes later, respondent Thomas Halpin came out of the office, got into the trailer, and drove off. (Mag. Tr. pp. 6-7, 10.) Detective Cole and the other officers followed for a short distance. The officers then pulled up along side of the truck. Detective Cole showed respondent Thomas Halpin his badge and pointed toward the curb. (Mag. Tr. p. 10.)

On the basis of Detective Cole's testimony, the magistrate issued a warrant authorizing a search of the camper. A subsequent search of the camper led to the seizure of 240 kilograms (over 500 pounds) of marijuana. (Gr. J. Tr. pp. 11-12.) The marijuana was

concealed in a secret compartment within the camper. (Gr. J. Tr. pp. 13-17.)

On December 14, 1970, Deputy Sheriff Warren Hockanson was the booking officer at the West End Jail in Ontario. (Gr. J. Tr. pp. 34-35.) After respondent Thomas Halpin had been booked and while he was still in custody, Deputy Hockanson placed a collect call through the operator for him. Prior to the call, respondent Halpin informed Deputy Hockanson of the number—but not the name—of the party he wished to call. The call was made from a jail telephone equipped with a recording device. The recording device was activated when Deputy Hockanson pushed a button while placing the telephone call for respondent Thomas Halpin. (Gr. J. Tr. pp. 35-37.) The transcript of tape-recorded conversation was played for the grand jury which indicted the respondents. (Gr. J. Tr. pp. 38-44.) A woman who responded to the name "Becky" [respondent Rebecca Halpin] accepted charges for the call. (Gr. J. Tr. pp. 38-39.) During the telephone call, respondent Thomas Halpin instructed her to have someone named Mike ". . . get rid of everything that's around there." (Gr. J. Tr. p. 39.) Also during the telephone conversation, respondent Thomas Halpin made further incriminating statements indicating that he felt that he had been "fingered" and that he had felt that he had been followed when he and his wife had left the Havasu Trailer Company on the morning of December 14. (Gr. J. Tr. pp. 40-41.)

### C. How the Federal Questions Arose

Each of the first three questions presented in this petition was considered on the merits by the California Supreme Court in the opinion filed by that court.

Since these claims were passed upon California's highest court, there is no preliminary issue as to the proper presentation of the federal claims in the California courts. *See Raley v. Ohio,* 360 U.S. 423, 436 (1959).

The California Supreme Court's opinion demonstrates quite clearly that the first question raised in this petition was both considered and decided:

> ". . . Petitioners thus argue that the testimony [offered in support of the search warrant] failed to satisfy the test which the Supreme Court announced in Aguilar v. Texas, supra, 378 U.S. 108, 114 [12 L.Ed.2d 723, 728-729], for the determination of the sufficiency of affidavits based upon the hearsay statements of an informant. We agree." *Halpin v. Superior Court,* 6 Cal. 3d 885, 892, 101 Cal. Rptr. 375, 379, 495 P.2d 1295, 1299 (1972).

With respect to the second question presented in this petition, the court below expressly held that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 preempted state legislation in the field of wiretapping and electronic surveillance. *Id.* at 900, 101 Cal. Rptr. at 385, 495 P.2d at 1305. In passing upon this second question, the California Supreme Court also considered the third question presented here by stating that:

> ". . . we reject the People's contention that it [Title III] is unconstitutional as applied because it infringes upon the police power of the state, reserved to it by the Tenth Amendment, to regulate the internal discipline of its penal institutions. . . ." *Id.* at 899, 101 Cal. Rptr. at 385, 495 P.2d at 1305.

With regard to the fourth question presented here, the California Supreme Court implicitly held that none of the exceptions in 18 U.S.C. § 2511 were applicable to this case when it held that the contents of the Halpins' telephone conversation were rendered inadmissible by Title III of the 1968 Act. *See id.* at 900, 101 Cal. Rptr. at 385, 495 P.2d at 1305. This question was raised in a timely petition for rehearing in the California Supreme Court. (Petn. for Rehearing, pp. 7-9.) Since petitioner could not reasonably anticipate on the basis of precedent that the California Supreme Court would hold Title III of the 1968 Crime Control Act applicable to the factual situation presented in this case, this issue was properly raised in the petition for rehearing. Where a question is created by an unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question, this Court has held that the assertion of the question for the first time on a petition for rehearing will support the exercise of this Court's jurisdiction. *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930).

## REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

### I

### This Case Presents an Important Constitutional Question With Respect to the Use of Informants' Tips in Determining Probable Cause for the Issuance of Search Warrants

In *Aguilar v. Texas,* 378 U.S. 108, 114 (1964), this Court set forth the following requirements for a sufficient search warrant affidavit:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U.S. 257, the magistrate must be informed of [1] some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and [2] some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, was 'credible' or his information 'reliable.'" (Footnote omitted; bracketed numerals added.)[3]

In the instant case, the California Supreme Court held that ". . . the affidavit consisting of the transscription of Cole's testimony before the magistrate fails to satisfy the first prong of the Aguilar test, . . ." *Halpin v. Superior Court,* 6 Cal. 3d 885, 896, 101 Cal. Rptr. 375, 382, 496 P.2d 1295, 1302 (1972). In so holding, the California Supreme Court concluded that

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[3]Mr. Justice Harlan's opinion for the Court in *Spinelli v. United States,* 393 U.S. 410, 413 (1969), referred to this language as the "two-pronged test" of *Aguilar.*

the affidavit failed to set forth any of the "underlying circumstances" necessary to enable the magistrate to exercise independent judgment as to the validity of the informant's conclusion that the narcotics were where he said they were.

This case thus presents an important question as to the proper interpretation of the first prong of *Aguilar v. Texas*. The California Supreme Court's decision in this case requires that the search warrant affidavit set forth facts showing how the informant arrived at his conclusion as to where the narcotics were located. In *Spinelli v. United States, supra,* 393 U.S. 410 (1969), this Court indicated that a factual showing as to how the informer concluded that the narcotics were located in the place to be searched was not necessary to satisfy the first prong of *Aguilar* so long as the information was sufficiently detailed to permit a reasonable inference that the informant gained his information in a reliable way. Referring to the first prong of *Aguilar*, the *Spinelli* opinion states:

> "The detail provided by the informant in Draper v. United States, 358 U.S. 307 (1959), provides a suitable benchmark. While Hereford, the Government's informer in that case did not state the way in which he had obtained his information, he reported that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. Moreover, Hereford went on to describe, with minute particularity, the clothes that Draper would be wearing upon his arrival at the Denver station. A magistrate, when confronted with such detail, could reasonably infer that the informant had

gained his information in a reliable way. . . ." *Spinelli v. United States, supra,* 393 U.S. at 416-417. (Footnote omitted.)

In the instant case, the magistrate was similarly confronted with such detail that he could reasonably infer that the informant had gained his information in a reliable way and was relying ". . . on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli v. United States, supra,* 393 U.S. at 416. The detail furnished by the informant in this case rivals in particularity the detail furnished by the Government's informant in *Draper.* The informant here had informed the Pomona police that a 1971 Ford Sport Custom truck, white in color with a dark green roof, would be parked at the Havasu Trailer Company, 1515 West Holt in Ontario, and that on this truck would be a ten and one-half foot Havasu camper cream color with dark simulated wood panel. The truck would carry temporary license number 1291208 and would be parked next to a blue Chevrolet automobile. The camper would have a false body in which approximately $100,000 worth of marijuana would be secreted. The informant also advised that an individual named "Tom," 6′ tall, 160-170 pounds, sandy hair, moustache and rimmed glasses would arrive by air from San Diego to pick up the truck.

Thus, the detail furnished by the informant in this case equals the detail supplied by the informant in *Draper.* Insofar as the *Spinelli* opinion holds that *Draper* is the benchmark for measuring the sufficiency of search warrant affidavits under the first prong of the *Aguilar* test, then the California Supreme Court's

decision in this case conflicts with both *Draper* and *Spinelli*.

It should be noted, however, that the Court's opinion in *Spinelli* was a plurality opinion with a separate concurring opinion by Mr. Justice White. Mr. Justice White did not join in the plurality opinion precisely because of his reservations about the plurality's interpretation of *Draper*. In his concurring opinion, Mr. Justice White indicated that the *Spinelli* decision left open the possibility of future reconsideration of either the *Draper* or the *Aguilar* decision. He stated:

> ". . . The Draper approach would reasonably justify the issuance of a warrant in this case, particularly since the police had some awareness of Spinelli's past activities. The majority, however, while seemingly embracing Draper, confines that case to its own facts. Pending full-scale reconsideration of that case, on the one hand, or of the Nathanson-Aguilar cases on the other, I join the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an equally divided court." *Spinelli v. United States, supra*, 393 U.S. at 428-29.

Presenting a factual situation which closely parallels the facts of *Draper*, the instant case affords an opportunity for this Court to reconcile the two competing lines of authority discussed in Mr. Justice White's concurrence. The importance of such a reconcilation was underscored in *United States v. Mitchell*, 425 F.2d 1353 (8th Cir.) (per then Circuit Judge Blackmun), *cert. denied*, 400 U.S. 853 (1970). In that case, Mr. Justice Blackmun observed that "It is perhaps not the easiest task for a lower court to walk the logical tight-

rope of Draper-Aguilar-Spinelli, . . ." *Id.* at 1360. Referring to Mr. Justice White's concurring opinion in *Spinelli,* Mr. Justice Blackmun stated:

> "Mr. Justice White's distress does not, of course, solve the present case for us, for, as an inferior federal court, we remain confronted with any 'tension' which exists between Draper, Aguilar, and Spinelli. However, so long as Draper remains on the books, so long as the Supreme Court majority chooses not to overrule it but to uphold it on its facts, and so long as it continues to be cited by the Supreme Court . . ., it must stand for us as good law for prearrest facts which paralleled the Draper facts. . . ." *Id.* at 1361. (Citations omitted.)

The Eighth Circuit is not the only court to have experienced confusion in reconciling *Draper* and *Spinelli* with the two-pronged test enunciated in *Aguilar.* Other circuits have also had difficulty in applying these cases in a consistent manner. See cases collected in Note, 45 N.Y.U. L.Rev. 908, 909 n.8 (1970). *See also The Supreme Court, 1968 Term,* 83 Harv. L.Rev. 7, 180 (1969). A grant of certiorari is clearly appropriate to eliminate the confusion engendered by the two competing lines of authority which have developed in the past decisions of this Court.

Moreover, a grant of certiorari on this issue is of vital importance to society and to criminal suspects as well as to law enforcement so that the rules governing the sufficiency of search warrant affidavits may be spelled out as clearly as possible. In *United States v. Ventresca,* 380 U.S. 102, 108 (1965), this Court admonished that ". . . A grudging or negative attitude

by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." Since the California Supreme Court's decision in this case is a more restrictive interpretation of the Federal Constitution than either *Draper* or *Spinelli*, the net result may be a frustration of the policy favoring the use of search warrants within this most populous State of the Union. For this reason also, this issue is an important question appropriate for review on certiorari.

## II

**This Case Presents an Important Question as to Whether the Wire Communications Provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 Preempt State Legislation in the Field of Wiretapping**

In this case, the California Supreme Court has held that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-20) preempted state legislation in the field of wiretapping and electronic eavesdropping. *Halpin v. Superior Court*, 6 Cal. 3d 885, 896-900, 101 Cal. Rptr. 375, 382-85, 495 P.2d 1295, 1302-05. This Court has not previously decided this question.

An early and authoritative resolution of this question by this Court is imperative to settle the status of state wiretapping legislation in light of the passage of the 1968 Act. In *Berger v. New York*, 388 U.S. 41, 47-48 nn. 4, 5 (1967), this Court noted that some 36 States had statutes prohibiting wiretapping. The California Invasion of Privacy Act (Cal. Pen. Code §§ 630-637.2), which the court below has held to have been preempted by Title III of the 1968 fed-

eral law, was enacted in 1967 as a comprehensive scheme to deal with the problems of electronic surveillance. The passage of this legislation gave California "one of the most comprehensive of state regulatory schemes." Comment, *Electronic Surveillance in California: A study in State Legislative Control*, 57 Calif. L. Rev. 1182, 1183 (1969). *See also* ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Electronic Surveillance*, pp. 19-21 (Approved Draft, 1971). The fact that this case involves one of the most thorough state statutes in the field makes this case particularly appropriate for resolution of the preemption question.

Furthermore, the passage of Title III of the 1968 Crime Control Act amended section 605 of the Communications Act of 1934 to remove wiretapping from the coverage of that section. *See* Pub. L. 90-351, Title III, § 803 (June 19, 1968), 82 Stat. 223. Interpreting the coverage of section 605 prior to the 1968 amendment, this Court had held:

> "... In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy. (Citations and footnotes omitted.)" *Benanti v. United States*, 355 U.S. 96, 105-06 (1957).

The considerations which impelled this Court to grant certiorari in *Benanti* warrant similar action in this case to decide whether the precedents established

under section 605 prior to its amendment apply with equal force to the wiretapping provisions of the 1968 Act.

III

**A Third Question of Importance Is Presented as to Whether an Application of Title III to This Case Would Involve an Unconstitutional Infringement of California's Right to Preserve the Security of Its Penal Institutions**

In the event that Title III of the 1968 Crime Control Act were held to preempt California's Invasion of Privacy Act, a subsidiary question of considerable importance would remain for decision by this Court. Petitioner submits that the application of Title III to bar monitoring inmate telephone calls represents a serious threat to the security of county jails and state prisons and involves an important question of constitutional dimensions as to whether Congress may displace legitimate state interests in this vital area.

In *Lanza v. New York*, 370 U.S. 139, 142-44 (1962), this Court held that the monitoring of conversations within a jail did not contravene the Fourth Amendment because official surveillance had traditionally been the order of the day in such institutions. More recently in *Johnson v. Avery*, 393 U.S. 483, 486 (1969), this Court stated:

> ". . . There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. . . ."

It is clear that there are certain activities that are beyond the reach of Congress in the enactment of

federal legislation. These activities are "those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. . . ." *Gibbons v. Ogden*, 9 Wheat. 1, 195, 6 L.Ed. 23 (1824). Mr. Justice Clark observed in *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964), that "This rule is as good today as it was when Chief Justice Marshall laid it down almost a century and a half ago."

Interference with the administration of state penal institutions is hardly necessary to execute the general powers of government which Congress sought to effect by passage of the Title III of the 1968 Act. If a line is to be drawn marking the limit of federal authority and the beginning of exclusive state jurisdiction reserved by the Tenth Amendment, that line must be drawn somewhere short of the jailhouse door. One cannot conceive of an activity more exclusively intrastate than the monitoring of an intrastate telephone call made from within a county jail. Since the placement of such telephone calls is supervised by jail officials, there is no possibility of monitoring interstate telephones by mistake.

In this case, the monitoring of the Halpins' telephone conversation was a legitimate exercise of the police power reserved to California by the Tenth Amendment. The requirements of prison discipline and security necessitate such monitoring. This type of security measure serves to prevent escapes. *See Davis v. Superior Court*, 175 Cal. App. 2d 8, 20, 345 P.2d 513 (1959). Such monitoring also serves to prevent recently arrested suspects from warning accomplices to flee or destroy evidence. In this case, respondent

Thomas Halpin instructed his wife to have a third party ". . . get rid of everything that's around there." (Gr. J. Tr., p. 39.) In *United Auto Workers v. Wisconsin Emp. Rel. Bd.*, 351 U.S. 266, 274-75 (1956), this Court stated:

> "The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect."

The importance of the federal question involved here is underscored by recent events at Attica prison in New York and San Quentin in California. Moreover, thousands of local jail and state prison employees are threatened with civil and criminal penalties under the 1968 Act if they continue traditional monitoring to preserve the security of their institutions. *See* 18 U.S.C. §§ 2511(1), 2520. All of these factors militate in favor of a grant of certiorari on this issue.

## IV

### There Is a Fourth and Final Question of Importance as to the Proper Construction of the Party Consent Exception to the 1968 Crime Control Act

An additional question is also presented as to whether the tape recording in this case came within an exception to the provisions of Title III of the 1968 Crime Control Act. 18 U.S.C. § 2511, subsection 2(c) provides:

> "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person

> is a party to the communication or one of the parties has given prior consent to such interception."

Under California law, the jailer is a necessary party to the two telephone calls which an arrested person has the right to make immediately after booking. California Penal Code section 851.5 provides that these two telephone calls must be made "in the presence of a public officer or employee." No court has yet passed upon the question of whether a public officer, under these circumstances, is a party to the wire communication for the purposes of 18 U.S.C. § 2511, subsection 2(c).

Moreover, even if the jail in this case were not a party to the telephone conversation *per se*, the requirment of a public officer's presence in California Penal Code section 851.5 provides a basis for implied consent as a condition of the right to make the statutory telephone calls. The Report of the Senate Judiciary Committee which accompanied the passage of the 1968 Crime Control Act recognized that:

> ". . . Consent may be expressed or implied. Surveillance devices in banks or apartment houses for institutional or personal protection would be impliedly consented to. . . ." S.Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 2 U.S. Code Cong. & Ad. News 2112, 2182 (1968).

Petitioner submits that this question of statutory construction is also appropriate for consideration of this Court in the event of a grant of certiorari on the other issues set forth in the petition. This question is closely connected to the other involved herein. Resolution of this issue will provide guidance to California and other

States as to whether the enactment of the statutes containing language similar to California Penal Code secton 851.5 will except the monitoring of inmate telephone calls from the proscriptions of Title III of the 1968 Crime Control Act.

**Conclusion**

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California Supreme Court.

Respectfully submitted,

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## APPENDIX A

### Opinion of the Supreme Court of the State of California

In the Supreme Court of the State of California, in Bank.

Thomas Halpin et al., Petitioners, v. The Superior Court of San Bernardino County, Respondent; The People, Real Party in Interest. L.A. 29949 (Superior Ct. No. CRW-2028).

Filed: April 24, 1972.

On February 3, 1971, petitioners Thomas and Rebecca Halpin, husband and wife, and Martin Silva were charged by indictment with conspiracy to transport marijuana (Pen. Code, § 182, subd. 1; Health & Saf. Code, § 11531), transportation of marijuana (Health & Saf. Code, § 11531) and possession of marijuana for sale (Health & Saf. Code, § 11530.5). The trial court denied their motions to set aside the indictment (Pen. Code, § 995) and to suppress evidence (Pen. Code, § 1538.5) which consisted of over 500 pounds of marijuana seized pursuant to an allegedly invalid search warrant and an incriminating tape recording made by police officers who eavesdropped on a conversation initiated by Halpin to his wife from a telephone located within the jail facility. Petitioners now seek a statutory writ of mandate (Pen. Code, § 1538.5, subd. (i)) to compel the trial court to suppress the aforementioned evidence. For reasons hereinafter set forth, we hold that the marijuana and the tape recording must be suppressed as evidence and that a peremptory writ of mandate must issue.

At the outset we deem it appropriate to state that we are compelled to declare invalid the warrant which

was issued in connection with the search of the vehicle and the subsequent seizure of the marijuana since the magistrate failed to follow the basic requirements for the issuance of such a warrant enunciated in 1964 by the Supreme Court in Aguilar v. Texas, 378 U.S. 108. The two-pronged test spelled out in that decision is not difficult to comprehend or follow.[1] Magistrates and law enforcement agencies, however, continue to manifest confusion. Some, while expressing a threshold knowledge of the requirements of *Aguilar,* treat them with unwarranted perfunctoriness. An example of such is illustrated by the colloquy between the magistrate who issued the search warrant and the deputy district attorney in the instant case.[2]

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[1]In Aguilar v. Texas (1964) 378 U.S. 108, the Supreme Court stated that "an affidavit [in support of a search warrant] may be based on hearsay information and need not reflect the direct personal observations of the affiant . . . [but] the magistrate must be informed of [1] some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and [2] some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed . . . was 'credible' or his information 'reliable'." (*Id.* at p. 114.)

[2]After Detective Cole of the Ontario Police Department testified in support of the search warrant (Pen. Code, § 1526, subd. (b)) the deputy district attorney and the magistrate engaged in the following conversation:

"THE COURT: I am satisfied with the search warrant if you are satisfied that you have completely complied in the following respects, sir: We have in the law several cases where the officer received information by radio by the dispatcher or another officer, which imparts information that then gives probable cause. Are you prepared to call the officer who transmitted the information to him to supplement your probable cause? In other words, how did that man who sent the information over the radio get his information, and is that reliable? If you are satisfied on that aspect I will go along with this.

"MR. [Deputy District Attorney]: I believe, your Honor, the state of the record before the Court is that information from a reliable source, the Captain of the Pomona Police Department, was furnished to the Ontario Police Department, that this

Courts do not require that an affidavit in support of a search warrant be drafted with the precision of a model legal instrument nor interpreted in a hypertechni-

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particular office in Pomona had prior experience with this particular defendant—

"THE COURT: That could be hearsay.

"MR. [Deputy District Attorney]: —and that the information furnished by the Pomona Police Captain in every particularity, and the information furnished by the informant to the police captain, and then to the Ontario Police Department, was found to be true. And under these circumstances I believe there was a basis for showing through the conduct and information furnished by the reliable informant there is a basis for the search of the truck presently in custody and under the control of the officials—

". . .

"THE COURT: This will almost beyond a doubt be contested. Now, let me ask you this, sir, are you allowed in anyway to supplement the showing up at this point on 1538.5 motion or a motion to suppress or any of the numerous ways it could be attacked by bringing in Captain Mooney to testify directly?

"MR. [Deputy District Attorney]: I suppose this should be off the record. I don't think there would be anything further to add to the record unless the Court has anything particular in mind.

"THE COURT: No, I have nothing in mind, except I just wondered if you could present additional testimony if you deemed it advisable at the time of a hearing on a 1538.5 and supplementing what you have on the record so far.

"MR. [Deputy District Attorney]: As a general state of law, I believe there are two ways such additional information could be presented, and if the Court feels there is need for it I will bring those people here now.

"THE COURT: I would rather not cause any delay here unless it is absolutely essential because that truck is under surveillance. Anything can happen out here, and the quicker you get there with a search warrant I think the quicker the interests of justice can be served.

"MR. [Deputy District Attorney]: I assume from that the Court is satisfied with the People's showing of—

". . .

"THE COURT: I am satisfied. I can see trouble coming up on that point at the hands of a skillful defense attorney who is now going to strike at the very vitality of the information over the radio and how Captain Mooney had his probable cause and

(This footnote is continued on next page)

cal manner.[3] However, once it is determined that a search without a warrant cannot be conducted under any of the well-recognized exceptions, *Aguilar* must be followed. "[T]he court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." (Aguilar v. Texas, supra, 378 U.S. 108, 111.)

On December 14, 1970, between 2:30 and 3 p.m., police officers, including Detective Cole of the Ontario Police Department, stopped a white and green 1971 Ford Sport Custom camper truck in the City of Ontario. Previously Cole had received information that a camper of the same description contained marijuana reputedly worth $100,000. After the truck pulled over to the curb the driver "jumped out of the truck, and as he did so he locked [it]." He was immediately placed under arrest and a search of his person produced a driver's license bearing the name of "Thomas Allon Halpin." Halpin declined to permit a search of the camper.

Cole then left the truck and Halpin in the custody of the other officers and proceeded to the chambers of the local magistrate to testify in support of an oral application for a search warrant.[4] Cole testified before

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how he acquired his information. That is why I raised the query, if this could be supplemented with further testimony.

"MR. [Deputy District Attorney]: Of course the Court is raising an issue that I have to deal with on the record, that is, are you personally satisfied with the probable cause shown here today?

"THE COURT: Yes, but with some reluctance because I can see some loose parts of the dike, and somebody is going to have to act like the Dutch boy with his finger in the hole at some future time."

[3]We include oral testimony in support of search warrants. (See fn. 2, supra; fn. 4, *infra*.)

[4]Penal Code section 1526, subdivision (b), provides for oral testimony in support of a search warrant as follows: 'In lieu of

the magistrate that "Captain Mooney [of the Pomona Police Department] called me [at 8:05 a.m. this morning], informing me that at a Havasu Trailer Company at 1515 West Holt I would find a 1971 Ford Sport Custom truck, white color with a dark green roof, and on this truck would be a ten and a half foot Havasu camper, cream color, with a darker wood—simulated wood—panel. He informed me that the truck would have a temporary license in the rear window, giving me a number of 1291208. He stated that this camper body would have a false type body and contained approximately $100,000 worth of marijuana. He stated that a white male known to him only as Tom [who apparently would be driving the camper] would be arriving in San Bernardino on a flight from San Diego. He described this male as being approximately six foot and weighing 160 to 170 pounds. He stated he had sandy hair, a mustache and wore horn-rimmed glasses. . . . At this time he did state that this truck would be parked next to a blue Chevrolet. . . . I asked him about [the informant's] reliability, and he stated that on November 30 he had received similar information from this informant which he gave to the San Francisco Police Department, which resulted in an arrest. At this time a Havasu camper was loaded similar to the one he described here and contained [a very large haul] of marijuana."

Cole further testified before the magistrate that after receiving this information he drove to the Havasu Trailer Company and, about 8:40 a.m., observed in the company's lot the truck which Captain Mooney had de-

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the written affidavit required in subdivision (a), the magistrate may take an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purposes of this chapter."

scribed to him. Cole called the sheriff's narcotic division for assistance and the officers began a surveillance of the truck about 9:30 a.m. At 11:30 a Volkswagen automobile drove into the parking lot. The frame around the license plate bore the name of a San Diego car dealer and the man (petitioner Halpin) in the car fit the description earlier given to Cole. Halpin left the automobile and went into the trailer company office. He remained there a short while then returned to the Volkswagen and drove away. Officers followed Halpin for a while but determined that if they continued they might breach the integrity of their surveillance and they thereupon returned to their positions near the Havasu Trailer Company. About 2:30 p.m. the Volkswagen returned to the camper lot. Halpin went into the company office, remained there a short while, and thereafter entered the camper and drove off. Cole and other officers followed for a short distance before Cole pulled up alongside, showed Halpin his badge and motioned to him to pull over to the curb.

The search warrant was issued solely on the foregoing testimony. The subsequent search of the camper produced over 500 pounds of marijuana.

Halpin was removed to the San Bernardino County jail and, after being booked, was granted permission to make a telephone call using the telephone within the custodial facilities. Halpin informed Deputy Sheriff Warren Hockanson of the number—but not of the name—of the party he wished to call, and Hockanson dialed it for him. (It was later determined that Halpin was calling his wife in San Diego.) Hockanson apparently left the room shortly after the conversation began and before incriminating statements were made

by Halpin and his wife.[5] Unknown to either of them, their conversation—in which they incriminated themselves and petitioner Silva—was monitored and tape recorded and later replayed before the grand jury.

## I. The Search Warrant

Petitioners initially contend that the testimony offered by Cole in support of the search warrant was constitutionally inadequate since it failed to reflect the underlying circumstances from which the issuing judge could conclude that the informant had personal knowledge of the information which he supplied to the police and that the informant was credible or his information reliable. Petitioners thus argue that the testimony failed to satisfy the test which the Supreme Court announced in Aguilar v. Texas, supra, 378 U.S. 108, 114, for the determination of the sufficiency of affidavits based upon the hearsay statements of an informant. We agree.

The first of *Aguilar's* two-pronged test requires that the magistrate be informed of some of the underlying circumstances from which the informant concluded that the items to be seized were where he claimed they

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[5]The record is not entirely clear on this point. The only questions asked of Hockanson concerning his presence during the call were as follows: "Q [Deputy District Attorney]: And were you present when he [Halpin] made a telephone call? A [Hockanson]: Yes, sir, I was. Q: Did you participate in the placing of that call? A: Yes, sir, I placed the call." Hockanson was not asked whether he was present during a part of or the entire conversation. However, in view of the incriminating statements Halpin made, and an admonition by his wife to "Remember your rights and don't say anything," it is unlikely that Hockanson was present. The factual issue might be important on a claim that Halpin had consented to the monitoring. The People, of course, would be required to establish such a waiver and it appears that had Hockanson been present during any portion of the call they would have established that fact.

were. In accordance with *Aguilar*, this court in People v. Hamilton (1969) 71 Cal.2d 176, 179-180 required that "the affidavit . . . allege the informant's statement in language that is factual rather than conclusionary and must establish that the informant spoke with personal knowledge of the matters contained in such statement."

In *Hamilton* the affidavit offered in support of the search warrant contained in relevant part the following allegations: "That said affiant was informed on July 13, 1967, by confidential reliable informant that Jane Doe Nora also known as Nora Mae Hamilton and John Doe Tony have in their possession at a white single story, one family dwelling located at 822 W. Alpine Street, Upland, Calif. approximately three hundred (300) rolls of dangerous drugs wrapped in tin foil in groups of ten pills per roll. [¶] That further your affiant reviewed San Bernardino County Sheriff Office report No. D.R. 112302 which indicated Nora Mae Hamilton and Raymond David Padilla were arrested at 822 W. Alpine Street, Upland, California, on April 14, 1967 for Possession of Marijuana and Possession of dangerous drugs found there. The pills found in the April 14, 1967 arrest were amphetamine, wrapped in tin foil in groups of 10. [¶] That said confidential reliable informant has furnished information in the past which has lead [*sic*] to eight (8) arrest[s] and convictions for narcotic and dangerous drug offenses." (People v. Hamilton, supra, 71 Cal.2d at p. 179.) We held that the affidavit failed to set forth allegations sufficient to enable the issuing magistrate to determine whether the informant had *personal knowledge* of the circumstances which he described. Moreover, we concluded that the information so provided was not suf-

ficiently detailed to permit even the inference that the informant had personal knowledge.[6] (People v. Hamilton, supra, 71 Cal.2d at p. 181.)

The testimony offered in support of the search warrant, in the instant case contains information of a general nature similar to that in the affidavit in *Hamilton*. The tip in this case merely indicated that Cole would find a certain, well-described truck containing marijuana at a particular location and that a person described with particularity would take possession of it. The magistrate was not provided with a sufficient statement of the underlying circumstances from which he could evaluate the validity of the informer's conclusion that "Tom" was handling, transporting or selling marijuana. For example, it is not alleged that the informant personally observed Halpin or others handling or transporting the marijuana, or that the informant had had dealings with "Tom" or any other person in connection with the camper, and it cannot be inferred that the informant gained his knowldge in any reliable way. (Spinelli v. United States (1969) 393 U.S. at p. 417.) It is thus apparent that Mooney's informant could as likely have obtained the information from an "offhand remark heard at a neighborhood bar," as from personal observations or some other reliable source.[7] (*Id.*)

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[6]We did not reject the possibility that sufficiently detailed information supplied by an informant in the absence of "factual allegations of his own experience" could warrant such an inference in a proper case. (People v. Hamilton (1969) 71 Cal.2d 176, 181; see also Spinelli v. United States (1969) 393 U.S. 410, 417; *id.* at pp. 425-426 (White, J. concurring).)

[7]It should be noted that merely because knowledge sufficient to satisfy *Aguilar's* first prong is gained in a reliable way does not automatically mean such information satisfies *Aguilar's* second

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"In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." (Spinelli v. United States, supra, 393 U.S. 410, 416.) Although the camper and Halpin were described in detail, the circumstances related by Cole did not describe any activity by Halpin or others which might be deemed as sufficiently criminal to warrant a belief on the part of the magistrate that Mooney's informant relied "on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

Citing People v. Benjamin (1969) 71 Cal.2d 296, 302-303, the People alternatively argue that even if the hearsay statements of Mooney's informant were not sufficient in themselves to justify the issuance of the warrant, when combined with the officers' observations the issuing magistrate could reasonably be led to believe that Halpin was transporting and selling marijuana.

The affidavit in support of the warrant in *Benjamin* was "quite extensive and reflected an investigation of defendant's activities which had taken place over a period of more than two months." (People v. Benjamin, supra, 71 Cal.2d at p. 299.) The information there provided by the informant, which appeared in the af-

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prong. (See fn. 1, supra; Spinelli v. United States, supra, 393 U.S. 410, 417, 425-426 (White, J. concurring).) *Aguilar's* second prong primarily concerns the police officer's past experience with the informant.

fidavit, was to the effect that the officer-affiant had received information from a confidential reliable informant that defendant was accepting wagers from bettors at a specifically described location and, three months later, at a specified telephone number. The content of the remaining allegations concerned the officer's already existing knowledge as to the same type of illegal activity and their subsequent investigation and observations over a two-month period.[8] Although we there

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[8]That information was summarized as follows: "[1] that affiant himself knew that bookmaking operations had previously been carried on in the same shoe repair shop by another person, and the shop was placed under surveillance; [2] that affiant there observed defendant meet and converse with persons known to affiant to be betters and after each such meeting observed defendant go to a public telephone and make a telephone call; [3] that one of affiant's fellow officers overheard one of such telephone calls wherein defendant made statements indicating that he was taking bets and wished to 'work a phone spot,' namely a location in which wagers are accepted by telephone; . . . [4] that affiant traced the telephone number to a specific apartment which was then placed under surveillance; [5] that on six specific dates in the month of March 1967 affiant and other officers observed defendant arriving at the subject apartment (which was not defendant's residence) at about 10 a.m. and remaining there until about 5:30 p.m. at which time he departed therefrom; [6] that on each of such dates horse racing was being conducted at racetracks within the United States, and the first race for the day was run shortly after defendant's entry into the subject apartment, and the last race for the day was run shortly before his departure; [7] that on March 9, 1967, after leaving the subject apartment, defendant proceeded to a certain club frequented by one Canard, the head of the bookmaking organization of which defendant was suspected to be a member; [8] that on that date he left the club with Canard, drove him to certain locations within the city, and waited while Canard made brief visits at such locations; [9] that on Saturday, March 11, 1967, after leaving the subject apartment, defendant again drove to the club and entered; [10] that affiant on the basis of prior experience knew that Canard customarily met on Saturday evenings with that member of the organization responsible for keeping permanent records of wagers in order to receive and examine said records for the week; [11] and that affiant on several occasions dialed the telephone number assigned to the subject apartment after 6 p.m. and received no answer." (People v. Benjamin, supra, 71 Cal.2d 296, 299-300.)

concluded "without hesitation that the hearsay statements of the informant were not sufficient *in themselves* to justify issuance of the warrant," we held that "the combination of that information with the officers' own observations produced a state of facts sufficient to lead the magistrate, as one of ordinary caution or prudence, to believe and conscientiously entertain a strong suspicion that defendant was engaged in [illegal activities]." (People v. Benjamin, supra, 71 Cal.2d 296, 301, 303 (italics in original); see also Spinelli v. United States, supra, 393 U.S. 410, 415.)

In the instant case, Cole's observations were not of the same character as those of the officers in *Benjamin*. Those officers already had knowledge of some of the illegal bookmaking activity described by their informant, and their investigation and observations thereafter continued over a period of more than two months. During that period of time they kept the suspected location under surveillance, saw the defendant meet with known bettors and conduct transactions from which the experienced officers could conclude that bookmaking activities were being carried on. (People v. Benjamin, supra, 71 Cal.2d at pp. 299-300.) Here, Cole observed only the seemingly innocent activity of Halpin as he entered and left the Havasu Trailer Company office and subsequently drove the camper away. (Cf. People v. Madden (1970) 2 Cal.3d 1017, 1023-1024; Price v. Superior Court (1970) 1 Cal.3d 836, 842.) Unquestionably, the inferences to be drawn from the account of the observations presented to the issuing magistrate in *Benjamin* were significantly conclusive of illegal activity. The account of the observations presented to the issuing magistrate in the instant case instead of corrobrating claims of illegal activity sug-

gested no criminal activity whatsoever and were entirely consistent with innocent conduct.

It should also be noted that although Cole testified that on November 30 Mooney had received similar information from the same informant which resulted in an arrest, such information is relevant only for purposes of *Aguilar's* second prong. (See fns. 1, 7, supra.) Since we conclude that the affidavit consisting of the transcription of Cole's testimony before the magistrate fails to satisfy the first prong of the *Aguilar* test, we need not reach the issue whether the informant, by virtue of the information he previously supplied to Mooney, could be deemed reliable within the meaning of the second prong of that test.

## II. The Electronic Surveillance

Petitioners contend that the electronically monitored and tape-recorded conversation between Halpin and his wife is inadmissible because it violated their rights under title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520), the Fourth Amendment to the Constitution of the United States and the California Invasion of Privacy Act. (Pen. Code, §§ 630-637.2).

Petitioners argue that Congress, in enacting title III, intended to preempt state legislation in the field of wiretapping and electronic surveillance and that since prior judicial approval was thus required but was not obtained for the tap, the telephone conversation between Halpin and his wife is inadmissible. The People maintain that title III is unconstitutional as applied because it constitutes an unreasonable infringement upon California's right, reserved to it by the Tenth

Amendment, to regulate and administer the internal affairs of its penal institutions.[9]

Section 2511 of title 18 of the United States Code makes it a crime, subject to the exceptions contained in subdivisions (2)(a) through (3) of that section, to wilfully intercept or disclose any wire or oral communication.[10] "Wire communication" is defined by section

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[9]Title III has been held constitutional. (See, e.g., United States v. Perillo (D. Del. 1971) 333 F.Supp. 914 (title III conforms to *Berger* and *Katz*); United States v. Leta (M.D.Pa. 1971) 332 F.Supp. 1357 (title III constitutional on its face); United States v. Scott (D.D.C. 1971) 331 F.Supp. 233 (Title III constitutional on its face); United States v. Cantor (E.D.Pa. 1971) 328 F.Supp. 561 (title III "sufficiently circumscribed" to protect rights of the individual guaranteed by the Fourth Amendment); United States v. Sklaroff (S.D. Fla. 1971) 323 F.Supp. 296 (title III not unconstitutional on invasion of privacy grounds); United States v. Escandar (S.D.Fla. 1970) 319 F.Supp. 295 (title III not unconstitutional on its face); see also United States v. Cox (10th Cir. 1971) 449 F.2d 679. But see, e.g., Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order"* (1969) 67 Mich. L. Rev. 455; Comment, *Electronic Surveillance by Law Enforcement Officers* (1969) 64 Nw. U. L. Rev. 63; Note, *Wiretapping and Electronic Surveillance—Title III of The Crime Control Act of 1968* (1969) 23 Rutgers L. Rev. 319.)

[10]Section 2511 provides in subdivision (1):

"Except as otherwise specifically provided in this chapter any person who—

"(a) willfully intercepts . . . any wire or oral communication;

"(b) willfully uses . . . any electronic, mechanical, or other device to intercept any oral communication . . .;

". . .

"(c) willfully discloses to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

"(d) willfully uses . . . the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; shall be fined not more than $10,000 or imprisoned not more than five years, or both."

In the Senate Report on the Omnibus Crime Control and Safe Streets Act of 1968 (Sen. Comm. on the Judiciary, Omnibus Crime Control and Safe Streets Act of 1968, Sen. Rep. No. 1097,

2510(1) as "any communication made . . . through the use of facilities for the transmission of communications by the aid of wire . . . or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications."[11] "Oral communication" is defined by section 2510(2) as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." Section 2515 makes inadmissible any evidence, and the fruits thereof, obtained in violation of sections 2510-2520.[12] The other sections are not here relevant.

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90th Cong., Second Sess. (1968) [hereinafter cited as Senate Report]) section 2511 was explained in part as follows:

"Section 2511 of the new chapter prohibits, except as otherwise specifically provided in the chapter itself, the interception and disclosure of all wire or oral communications. Paragraph (1) sets out several prohibitions. Subparagraph (a) prohibits the interception itself. This eliminates the requirement under existing law that an 'interception' and a 'divulgence' must take place. See Massicot v. United States [(5th Cir. 1958) 254 F.2d 58, *cert. denied* (1958) 358 U.S. 816]; Benanti v. United States [(1957) 355 U.S. 96, 102 n. 10).

"Subparagraph (a) establishes a blanket prohibition against the interception of any wire communication. Since the facilities used to transmit wire communications form part of the interstate or foreign communications network, Congress has plenary power under the commerce clause to prohibit all interception of such communications, whether by wiretapping or otherwise. (Weiss v. United States [(1939) 308 U.S. 321].)" (Sen. Rep., supra, at pp. 91-92.)

[11]In the Senate Report "wire communication" was defined "to include all communications carried by a common carrier, in whole or in part, through our Nation's communications network. The coverage is intended to be comprehensive." (Sen. Rep., supra, at p. 89.)

[12]Section 2515 provides: "Whenever any wire or oral communication has been intercepted, no part of the contents of

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Sections 2510-2520 were drafted to meet the standards of Berger v. New York (1967) 388 U.S. 41 and Katz v. United States (1967) 389 U.S. 347.[13] (Sen. Rep., supra, at p. 66.)[14] The legislation "has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." (Sen. Rep., supra, at p. 66.)[15] An intent to have certain provisions of the law completely occupy the field of wire-tapping and electronic surveillance is evidenced by their plain and all-inclu-

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such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." (See also Sen. Rep., supra, at p. 96.)

[13]But see, e.g., Schwartz, supra, 67 Mich. L. Rev. 455; Comment, supra, 64 Nw. U. L. Rev. 63; Note, supra, 23 Rutgers L. Rev. 319.

[14]The House Committee on the Judiciary also made a similar report (No. 488, July 17, 1967). The House bill was passed in lieu of the Senate bill after the text of the Senate bill was substituted for that of the House bill. (2 U.S. Code Cong. & Admin. News 2112 (90th Cong., Second Sess. (1968)).)

[15]The comments in the Senate Report concerning the purpose of title III are as follows: "[¶] Because of the complexity in the area of wiretapping and electronic surveillance, the committee believes that a comprehensive and in-depth analysis of title III would be appropriate in order to make explicit congressional intent in this area. [¶] Section 801.—Section 801 [Pub. L. 90-351] contains the findings relating to the conditions with which the proposed legislation is designed to deal, and of the actions necessary to cope with those conditions. . . . Paragraph (b) recognizes that to protect the privacy of wire and oral communications, to protect the integrity of court and administrative proceeding[s] and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire or oral communications may be authorized. It also finds that all unauthorized interception of such communications should be prohibited, as well as the use of the contents of unauthorized interceptions as evidence in courts and administrative hearings." (Sen. Rep., supra, at pp. 88-89.)

sive wording. (See Allen v. Dumont Laboratories v. Carroll (3d Cir. 1950) 184 F.2d 153, 155.) For example, section 2511(1)(a) provides penal sanctions for "any person who willfully intercepts . . . *any* wire or oral communication," and section 2510(1) defines "wire communication" as "*any* communication made . . . through the use of facilities . . . furnished or operated by . . . a common carrier . . . for the transmission of interstate or foreign communications." (Italics added.) That Congress intended to enact comprehensive national legislation, against which all then existing federal and state legislation was to be measured, is also illustrated by the comments of the Senate Committee on the Judiciary.[16] At the same time, however, Congress left room for the states to supplement the law in certain areas,[17] provided the regulations are not more permissive. (See, e.g., Sen. Rep., supra, at pp. 98-99.)

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[16]The following comments in the Senate Report indicate that intent: "Both proponents and opponents of wiretapping and electronic surveillance agree that the present state of the law in this area is extremely unsatisfactory and that the Congress should act to clarify the resulting confusion." (Sen. Rep., supra, at p. 67.) "On the State level, there is little uniformity. . . . Only a few States have enacted statutes dealing with other forms of electronic surveillance. . . . Even those existing statutes, however, must now be reformed in light of the standards for constitutional electronic surveillance laid down by the Supreme Court in Berger v. New York [(1967) 388 U.S. 41] and Katz v. United States [(1967) 389 U.S. 347]." (It should be noted at this point that the California Invasion of Privacy Act became effective on November 7, 1967; *Berger* was decided on June 6, 1967 and *Katz* was decided on December 18, 1967.) "[¶] . . . The need for comprehensive, fair and effective reform setting uniform standards is obvious. New protections for privacy must be enacted. Guidance and supervision must be given to State and Federal law enforcement officers. This can only be accomplished through national legislation." (Sen. Rep., supra, at p. 69.) See also Comment, *Electronic Surveillance in California: A Study in State Legislative Control* (1969) 57 Cal. L. Rev. 1182, 1197, 1199-1200.

[17]The Senate Report specifically indicates areas in which the Congress did not intend to preempt state legislation; for ex-

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Congress' authority in enacting legislation to accomplish its asserted purpose is said to emanate from its plenary power under the commerce clause (see, e.g., Prudential Insurance Company v. Benjamin (1946) 328 U.S. 408, 423; see also Heart of Atlanta Motel v. United States (1964) 379 U.S. 241; Weiss v. United States (1939) 308 U.S. 321; cf. American Power & Light Company v. Securities & Exchange Commission (1946) 329 U.S. 90) to regulate telegraph and telephone lines as instrumentalities of interstate commerce (Western Union Telegraph Company v. Lenroot (1945) 323 U.S. 490, 502)[18] and the right of privacy "arising under certain provisions of the Bill of Rights and the due process clause of the Fourteenth Amendment."[19] Since title III is a valid exercise of Congress' power under particular provisions of the Constitution, we reject the People's contention that it is unconstitutional as applied because it infringes upon the police power of the state, reserved to it by the Tenth Amendment, to regulate the internal discipline of its

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ample: the degree of disclosure and scope of knowledge required to violate section 2511 (Sen. Rep., supra, at p. 93); the provisions of section 2512 banning the manufacture, distribution, possession and advertisement of interception devices (Sen Rep., supra, at p. 94); rules in section 2516 governing the authorization of intercepting communications (Sen. Rep., supra, at p. 98); and provisions in section 2520 authorizing the recovery of civil damages (Sen. Rep., supra, at p. 107). See also Pennsylvania v. Nelson (1956) 350 U.S. 497. We do not determine whether 18 U.S.C. §§ 2510-2520 or the Senate Report have authorized the federal government to regulate areas of electronic eavesdropping solely within the legislative domain of this state, or whether it has inadvertently failed to indicate other areas in which it intended to set standards.

[18]Section 605 of the Communications Act of 1934—the predecessor of title III (Sen. Rep., supra, at p. 107) was a comprehensive scheme for regulating interstate communication. (Benanti v. United States (1957) 355 U.S. 96, 105.)

[19]See Senate Report, supra, at page 92.

penal institutions. "[T]he [Tenth] amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." (United States v. Darby (1941) 312 U.S. 100, 124.) "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." (*Id.* at p. 114; cf. Benanti v. United States (1957) 355 U.S. 96, 104.)

Unquestionably the conversation between Halpin and his wife was a wire communication within the meaning of section 2510(1) since it was carried over wires between Ontario and San Diego and operated by a common carrier engaged in interstate communications. Moreover, the conversation was intercepted within the meaning of section 2510(4)[20] and was not authorized in accordance with section 2516. The contents of the conversation are therefore inadmissible. (§ 2515.)

Since we hold that title III has preempted particular fields of wiretapping and electronic surveillance, we need not reach the issue whether the Halpins' right of privacy was invaded by monitoring and tape recording the phone call.[21]

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[20]Section 2510(4) provides: "'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." (See also Sen. Rep., supra, at p. 90.)

[21]The Attorney General maintains that persons in jail do not have a reasonable expectation of privacy. See Pen. Code, §§851.5, 4570; People v. Lopez (1963) 60 Cal.2d 223; In re Ferguson (1961) 55 Cal.2d 663; People v. Califano (1970) 5 Cal.App.3d 476; People v. Blair (1969) 2 Cal.App.3d 249;

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Let a peremptory writ of mandate issue directing the respondent superior court to suppress the evidence obtained in the execution of the search warrant and from the interception of petitioner's call to his wife from the telephone at the jail.

Wright, *C. J.*

We concur:

McComb, *J.*
Peters, *J.*
Tobriner, *J.*
Burke, *J.*
Sullivan, *J.*

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People v. Chandler (1968) 262 Cal.App.2d 350; People v. Miller (1967) 252 Cal.App.2d 877; People v. Apodaca (1967) 252 Cal.App.2d 656; People v. Hernandez (1964) 229 Cal.App.2d 143; People v. Morgan (1961) 197 Cal.App.2d 90; Davis v. Superior Court (1959) 175 Cal.App.2d 8.) We leave unresolved the precise limitations on that rule. Moreover, we do not determine whether conversations made in this context may also be immune from interception because they are also privileged. (see 18 U.S.C. § 2517(4); Schwartz, supra, 67 Mich. L. Rev. 455, at pp. 466-468; Comment, supra, 57 Cal. L. Rev. 1182, at pp. 1228-1230.)

## CONCURRING OPINION BY MOSK, J.

I concur.

I agree completely with the court's opinion on federal preemption of electronic surveillance. On the subject of the search warrant, however, I concur under compulsion of People v. Hamilton (1969) 71 Cal.2d 176.

The admonition to magistrates on the improvident issuance of search warrants, and on the two-pronged requirements of Aguilar v. Texas (1964) 378 U.S. 108, is well advised. With relatively simple effort and a minimum of cerebration, issuing judges can prevent the embarrassment that is theirs, and the potential injustice to society, when a faulty warrant prevents evidence from being introduced at a trial.

On the other hand, there are also two-pronged mitigating considerations for reviewing courts. First, the exigent circumstances under which search warrants are originally sought often preclude careful preparation and thoughtful consideration by the magistrate; the motor vehicle in transit here is a typical example of the necessity for haste. Second, the lay character of those who generally prepare affidavits for warrants suggests the documents will seldom be drafted with consummate legal skill.[1]

The manner in which warrants should be interpreted has divided courts from Draper v. United States (1959) 358 U.S. 307, through *Aguilar* and its progeny down to United States v. Harris (1971) 403 U.S. 573. Often as a last refuge, reliance upon an illusory test of "common sense" has been employed in a wide variety

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[1]Here more expertise could have been expected, since a deputy district attorney personally appeared before the magistrate.

of search and seizure contexts. For example, in United States v. Ventresca (1965) 380 U.S. 102, 109, Justice Goldberg wrote that the affidavit should be "read in a commonsense way." In the same opinion he insisted that "affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and relistic fashion." Justice Black, dissenting in Katz v. United States (1967) 389 U.S. 347, 366, stated that "common sense requires . . . a liberal construction." Conflicting views in Spinelli v. United States (1969) 393 U.S. 410, invoked the same doctrine: Justice Harlan, for the majority, wrote, "[I]ssuing magistrates are not to be confined . . . by restrictions on the use of their common sense" (*id.* at p. 419); Justice Fortas, disagreeing in the same case, maintained that "a policeman's affidavit is entitled to common-sense evaluation." (*Id.* at p. 439.) Justice Black, dissenting in Vale v. Louisiana (1970) 399 U.S. 30, 36, repeated his earlier opinion for the majority in Preston v. United States (1964) 376 U.S. 364, that "common sense dictates that reasonableness varies with the circumstances of the search." In United States v. Harris, supra, at page 583, Chief Justice Burger wrote that "Commonsense . . . would induce a prudent and disinterested observer to credit these statements." And even a majority of this court spoke of "a commonsense interpretation" in People v. Superior Court (Johnson et al.) (1972) 6 Cal.3d 704, 711.

Whatever may be the appropriate test, I have urged numerous times that this court must give law enforcement officers every encouragement to seek warrants, rather than to compel them to depend upon their hasty and competitive judgment in the field. (See my dissents in People v. Scoma (1969) 71 Cal.2d 332, 340; People

v. Hamilton, supra, at p. 183; People v. Sesslin (1968) 68 Cal.2d 418, 431.) An excessively restrictive interpretation of affidavits, or as the high court in *Ventresca*, supra, put it, a "grudging or negative attitude by reviewing courts toward warrants" will in the long run "tend to discourage police officers from submitting their evidence to a judicial officer before acting." (380 U.S. at p. 108.)

It is of vital importance to society, to suspects, and for the protection of law enforcement officers themselves, that probable cause be determined by a "neutral and detached magistrate." (Johnson v. United States (1948) 333 U.S. 10, 14.) To this end "it obviously is not desirable to place unnecessary burdens" upon the use of warrants. (People v. Keener (1961) 55 Cal.2d 714, 723.)

Were it not for *Hamilton* and if we were writing on a clean slate, I would be inclined to treat the instant warrant—though certainly it is no model—somewhat more tolerantly, and to find it does not offend the Fourth Amendment, or article I, section 19, of the Constitution of California.

Mosk, *J.*

## APPENDIX B

### Order Denying Rehearing

In the Supreme Court of the State of California, in Bank. L.A. No. 29949.

Halpin et al., Petitioners; v. The Superior Court of San Bernardino County, Respondent; The People, Real Party in Interest.

Order Due May 24, 1972.

Filed May 23, 1972.

Petition of Real Party in Interest for rehearing DENIED.

Application for stay of the issuance of peremptory writ of mandamus is denied.

Wright
Chief Justice

## APPENDIX C

### Opinion of the Court of Appeal

The Court of Appeal, Fourth District, Division Two, State of California.

Thomas Halpin, et al., Petitioners, v. Superior Court, et al., Respondents, People of the State of California, By their Attorney, Lowell E. Lathrop, District Attorney for the County of San Bernardino, Real Party Interest. 4 Civil 11542, (Sup.Ct.No. CRW-2028).

Filed September 22, 1971.

PETITION for writ of mandamus. Petition denied.

Miller, Glassman & Browning, Friedman, Sloan & Bresee, by Paul G. Sloan, for Petitioners.

Lowell E. Lathrop, District Attorney, and Joseph D. Canty, Jr., Deputy District Attorney, for Real Party in Interest.

No appearance for Respondents.

Petitioners Thomas Halpin, Rebecca Halpin and Martin Silva were indicted by a grand jury for conspiracy to transport marijuana, transportation of marijuana, and possession of marijuana for sale. Their motions to suppress evidence and to dismiss the indictment were denied, and they seek a writ of mandate ordering the superior court to suppress the evidence.

Detective Cole of the Ontario Police Department orally testified before a magistrate in support of a search warrant as follows: A Pomona police officer told him that an informant—who had two weeks before given similar information to the Pomona police, who had relayed it to San Francisco, where an arrest was made and a vehicle similar to the one described below seized with a large amount of marijuana—had informed him

that at the Havasu Camper Company, 1515 West Holt in Ontario, a 1971 Fort Sport Custom truck, white in color with a dark green roof, would be parked and on this truck would be a 10½ foot Havasu camper, cream color with a dark simulated wood panel. The truck would carry a temporary license No. 1291208 and it would be parked next to a blue Chevrolet automobile. The camper would have a false body in which approximately $100,000.00 worth of marijuana would be secreted. Officer Cole went to the described location and found a truck and camper which met this description, including the license number. The truck and camper were parked next to a blue Chevrolet. Officer Cole also was advised that an individual named "Tom," 6 feet tall, 160 to 170 pounds, sandy hair, mustache and horn-rimmed glasses would arrive by air from San Diego to pick up the truck. Sure enough, a man 6 feet tall, 160 to 170 pounds, sandy hair, mustache and horn-rimmed glasses, arrived. He did not arrive by air, but drove a car with the name of a San Diego dealer on the license plate frame. He arrived, then left and went to the mountains with his wife and child. He returned to pick up the truck and the police pulled him over. As they did so and identified themselves, he jumped out and locked the truck. His driver's license indicated that his first name was "Tom," and his full name, Thomas Halpin. He refused to consent to a search, whereupon the officers proceeded to the magistrate's office and related the above facts. Upon hearing this testimony, the magistrate observed that he was satisfied with the presentation and ordered the issuance of the warrant. There was some general discussion about getting additional information, but the magistrate observed reasonably that he "would rather not cause

any delay here unless it is absolutely essential because that truck is under surveillance. Anything can happen out there, and the quicker you get there with the search warrant I think the quicker the interests of justice can be served."

Armed with the search warrant, the officer searched the vehicle and found secreted within it over 500 pounds of marijuana. Thomas Halpin was arrested and taken to a branch of the San Bernardino County Jail from which he made a phone call to his wife, monitored by the sheriff's office, in which both he and his wife made incriminating statements involving themselves and a third party, Martin Silva.

A transcript of the recorded phone conversation was read to the grand jury; it forms a substantial part of the evidence on which the indictment was based. Petitioners attack the admissibility of this evidence on two grounds, but we have determined it was properly admitted.

Petitioners first attack the validity of the search warrant.

By every standard established in Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637; Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723; People v. Benjamin, 71 Cal.2d 296, 78 Cal.Rptr. 510, 455 P.2d 438; and People v. Hamilton, 71 Cal.2d 176, 77 Cal.Rptr. 785, 454 P.2d 681; the evidence set forth above is constitutionally sufficient to support the issuance of the warrant. Here we have the amazingly detailed information of the informant, plus evidence of his previous reliability. Although the testimony did not include the allegation that the informant spoke from personal knowledge, the detail of the

description was so great the magistrate could infer this personal knowledge. The facts presented to the magistrate are, under those authorities, an adequate compliance with the so-called two-pronged test of *Aguilar* that the magistrate must be informed of some of the underlying circumstances from which the informant concludes that the contraband is where he claims it to be and some of the underlying circumstances from which the officer concludes that the informant was credible or his information is reliable. The facts presented to the magistrate would lead him as a man of ordinary caution and prudence to conscientiously entertain a strong suspicion that the truck contained marijuana. People v. Fein, 4 Cal.3d 747, 94 Cal.Rptr. 607, 484 P.2d 583, relied on by petitioners, involved a search without a warrant based on information given by untested informants. The magistrate here knew that this informant had previously given accurate information about a similar camper body; there was no need for corroborating facts pertaining to criminal activity. The testimony gave the magistrate proper grounds to issue a warrant.

I.

THE KATZ CONTENTION.

In Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, the court denied admission into evidence of a tapped phone call made from a public phone booth, declaring that the defendant had a constitutionally protected, reasonable expectation of privacy in making the call. However, the law provides that a phone call from jail be made in the presence of an

officer. (Penal Code, § 851.5.) Thus, the prisoner has no expectation of privacy, reasonable or otherwise, when an officer may be standing with him. Neither does anyone receiving a call from a jail or a penitentiary have a reasonable expectation of privacy. Such calls are monitored for the security of the jail just as mail is censored and visitors' conversations within jail are monitored. Jails and prisons are not Brownie camps. They contain among their clientele a number of anti-social, irresponsible and sometimes vicious and dangerous people who would like to leave and who care not about the niceties of due process of law in so doing. Every jail and prison has a serious security problem. It is essential that those in charge of those institutions have certain controls over their involuntary guests which are simply not available to the state in dealing with the unincarcerated individual. "The courts are and should be reluctant to interfere with or to hamper the discipline and control that must exist in a prison * * * These prisoners include many violent and unscrupulous men who are ever alert to set law and order at defiance within or without the prison walls." (In re Riddle, 57 Cal.2d 848, 852, 22 Cal.Rptr. 472, 474, 372 P.2d 304, 306.)

While many attempted escapes arise completely within the institution, history, some of it uncomfortably current, records an alarming number of escapes or attempted escapes in which outside help was or may have been solicited. Thus, the law has given certain powers of censorship and control over communications

with those incarcerated in jails and prisons. (See Penal Code, § 4570; Penal Code, § 631(b)(3); Penal Code § 632(e)(3); People v. Lopez, 60 Cal.2d 223, 32 Cal. Rptr. 424, 384 P.2d 16; People v. Califano, 5 Cal. App.3d 476, 85 Cal.Rptr. 292; People v. Blair, 2 Cal. App.3d 249, 82 Cal.Rptr. 673; People v. Apodaca, 252 Cal.App.2d 656, 60 Cal.Rptr. 782.) "To censor and in certain instances to forbid communication to and from a prison is inherent in its administration. Such authority is necessary to protect against escape." (Davis v. Superior Court, 175 Cal.App.2d 8, 20, 345 P.2d 513, 521.) "A man detained in jail cannot reasonably expect to enjoy the privacy afforded to a person in free society. His lack of privacy is a necessary adjunct to his imprisonment." (People v. Morgan, 197 Cal.App.2d 90, 93, 16 Cal.Rptr. 838, 840.)

Thus, neither an incarcerated prisoner nor the recipient of a call from him has a reasonable expectation of privacy and the rationale of *Katz* simply does not apply to this situation. An exception might be a call to an attorney in which the facts of the case or possible defenses are discussed. The attorney has a reasonable expectation of privacy; however, a call to an attorney is not involved in this case.

## II.

## THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT CONTENTION.

18 U.S.C. 2515 contains a comprehensive exclusionary rule for evidence obtained in violation of that chapter which is applicable to courts and grand juries of states as well as to the federal government. We note that none of the express exceptions in section 2511 or in the rest of the chapter operate to permit the type

of a tap involved in this case. And the chapter (i.e., 18 U.S.C., sections 2510-2520), since it raises serious constitutional questions, may not be interpreted to permit activities not expressly authorized in its comprehensive provisions. (See Application of United States, 9 Cir., 427 F.2d 639, 643.)

However, the legislative history suggests that the act is intended to apply only where the conversations are actually private. The congressional findings supporting the act are replete with references to privacy.

Public Law 90-351, § 801:

"(a) * * * Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private * * *

"(b) In order to protect effectively the privacy of wire and oral communications * * *

"(d) To safeguard the privacy of innocent persons. * * *."

The Senate report accompanying the legislation states "privacy of communication" is the value to be preserved by the chapter. (Senate Report No. 1097, 90th Cong., 2d Sess. (1968); reprinted in U.S. Code Cong. and Admin.News, (1968), p. 2112, at 2154.)

The justification above described for eavesdropping on individuals in jails and penitentiaries negates any expectation of privacy in those situations. Thus, it is clear that petitioner Thomas Halpin, in jail, had no right to speak privately. As indicated, Penal Code, § 851.5, expressly permits an officer to be present during the phone call. The record shows that an officer was there for part of the time. As we stated in our discussion under the *Katz* contention, the recipient of a call

from an inmate in a jail or penitentiary has no reasonable expectation of privacy. Thus, neither Thomas Halpin nor his wife had a reasonable expectation of privacy in their conversations; nor was any right of Martin Silva infringed. Since the history of 18 U.S.C. 2515 indicates that this section is to apply only where the conversation is actually private, we hold that this conversation was not protected by that section and was properly considered by the grand jury as to all three petitioners.[1]

Petition denied.

KERRIGAN and KAUFMAN, JJ., concur.

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[1]Political scientists agree that the enactment of The Omnibus Crime Control and Safe Streets Act of 1968 represents the unfavorable reaction of Congress to certain decisions of the Supreme Court which Congress felt had unduly hampered legitimate law enforcement activities. It would be unrealistic to attempt to read into that Act any intent to establish stricter rules against law enforcement activities than had evolved from the Supreme Court's decisions. (See Congress against the Supreme Court by Adam Carlyle Breckenridge, University of Nebraska Press [1970])

## APPENDIX D

### Statutes Involved

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-20), in relevant part:

18 U.S.C. § 2510. *Definitions*

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a com-

munications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 U.S.C. § 2511. *Interception and disclosure of wire or oral communications prohibited*

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the

normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided,* That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States

or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

18 U.S.C § 2515. *Prohibition of use as evidence of intercepted wire or oral communications*

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other pro-

ceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

THE CALIFORNIA INVASION OF PRIVACY ACT (California Penal Code §§ 630-637.2)

Cal. Pen. Code § 630. *Legislative finding and intent*

The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society.

The Legislature by this chapter intends to protect the right of privacy of the people of this state.

The Legislature recognizes that law enforcement agencies have a legitimate need to employ modern listening devices and techniques in the investigation of criminal conduct and the apprehension of lawbreakers. Therefore, it is not the intent of the Legislature to place greater restraints on the use of listening devices and techniques by law enforcement agencies than existed prior to the effective date of this chapter.

Cal. Pen. Code § 631. *Wiretapping*

(a) *Prohibited acts; punishment; recidivists.* Any person who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or

otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system, or who willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any such wire, line, or cable, or is being sent from, or received at any place within this state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained, or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things mentioned above in this section, is punishable by a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding three years, or by both such fine and imprisonment in the county jail or in the state prison. If such person has previously been convicted of a violation of this section or Section 632 or 636, he is punishable by fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding five years, or by both such fine and imprisonment in the county jail or in the state prison.

(b) *Exceptions.* This section shall not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of con-

struction, maintenance, conduct or operation of the services and facilities of such public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of such a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

(c) *Evidence.* Except as proof in an action or prosecution for violation of this section, no evidence obtained in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding.

Cal. Pen. Code § 632. *Eavesdropping on or recording confidential communications*

(a) *Prohibited acts; punishment; recidivists.* Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential communication, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punishable by fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding three years, or by both such fine and imprisonment in the county jail or in the state prison. If such person has previously been convicted of a violation of this section or Section 631 or 636, he is punishable by fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding five years,

or by both such fine and imprisonment in the county jail or in the state prison.

(b) *Person.* The term "person" includes an individual, business association, partnership, corporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording such communication.

(c) *Confidential communication.* The term "confidential communication" includes any communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

(d) *Evidence.* Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding.

(e) *Exceptions.* This section shall not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services

and facilities of such public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of such a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

(f) *Hearing aids.* This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

Cal. Pen. Code § 633. *Law enforcement officers; authorized use of electronic, etc., equipment*

Nothing in Section 631 or 632 shall be construed as prohibiting the Attorney General, any district attorney, or any assistant, deputy, or investigator of the Attorney General or any district attorney, or any officer of the California Highway Patrol, or any chief of police, assistant chief of police, or policeman of a city or city and county, or any sheriff, under sheriff, or deputy sheriff regularly employed and paid as such of a county, or any person acting pursuant to the direction of one of the above-named law enforcement officers acting within the scope of his authority, from overhearing or recording any communication which they could lawfully overhear or record prior to the effective date of this chapter.

Nothing in Section 631 or 632 shall be construed as rendering inadmissible any evidence obtained by the above-named persons by means of overhearing or recording any communication which they could lawfully overhear or record prior to the effective date of this chapter.

Cal. Pen. Code § 633.5 *Recording communications relating to commission of extortion, kidnapping, bribery, felony involving violence against the person, or violation of § 653m*

Nothing in Section 631 or 632 shall be construed as prohibiting one party to a confidential communication from recording such communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to such communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person, or a violation of Section 653m, and nothing in Section 631 or 632 shall be construed as rendering inadmissible in a prosecution for extortion, kidnapping, bribery, any felony involving violence against the person, or a violation of Section 653m, or any crime in connection therewith, any evidence so obtained.

Cal. Pen. Code § 634. *Trespass for purpose of committing prohibited acts; punishment*

Any person who trespasses on property for the purpose of committing any act, or attempting to commit any act, in violation of Section 631, 632 or 636 shall be punishable by fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding three years, or by both such fine and imprisonment in the county jail or in the state prison. If such person has previously been convicted of a violation of this section or Section 631, 632 or 636, he is punishable by fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding five

years, or by both such fine and imprisonment in the county jail or in the state prison.

Cal. Pen. Code § 635. *Manufacture, sale and possession of eavesdropping devices; punishment; recidivists; exceptions*

(a) Every person who manufacturers, assembles, sells, offers for sale, advertises for sale, possesses, transports, imports, or furnishes to another any device which is primarily or exclusively designed or intended for eavesdropping upon the communication of another is punishable by fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding three years, or by both such fine and imprisonment in the county jail or in the state prison. If such person has previously been convicted of a violation of this section, he is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding five years, or by both such fine and imprisonment in the county jail or in the state prison.

(b) This section shall not apply to

(1) An act otherwise prohibited herein when performed by (i) a communication utility or an officer, employee or agent thereof for the purpose of construction, maintenance, conduct or operation of, or otherwise incident to the use of, the services or facilities of the utility, or (ii) a state, county or municipal law enforcement agency or an agency of the federal government, or (iii) a person engaged in selling such devices for use by, or resale to, agencies of a foreign govern-

ment under terms approved by the federal government, communication utilities, state, county or municipal law enforcement agencies, or agencies of the federal government, or

(2) Possession by a subscriber to communication utility service of such a device furnished by such utility pursuant to its tariffs.

Cal. Pen. Code § 636. *Eavesdropping or recording conversation between prisoner and his attorney, clergyman or physician; offense; exception*

Every person, who, without permission from all parties to the conversation, eavesdrops on or records by means of an electronic or other device, a conversation, or any portion thereof, between a person who is in the physical custody of a law enforcement officer or other public officer, or who is on the property of a law enforcement agency or other public agency, and such person's attorney, religious advisor, or licensed physician, is guilty of a felony; provided, however, the provisions of this section shall not apply to any employee of a public utility engaged in the business of providing service and facilities for telephone or telegraph communications while engaged in the construction, maintenance, conduct or operation of the service or facilities of such public utility who listens in to such conversations for the limited purpose of testing or servicing such equipment.

Cal. Pen. Code § 637. *Disclosure of telegraphic or telephonic message; punishment; exception*

Every person not a party to a telegraphic or telephonic communication who willfully discloses the contents of a telegraphic or telephonic message, or any

part thereof, addressed to another person, without the permission of such person, unless directed so to do by the lawful order of a court, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding five thousand dollars ($5,000), or by both fine and imprisonment.

Cal. Pen. Code § 637.1. *Telegraphic or telephonic message; opening or procuring improper delivery; punishment*

Every person not connected with any telegraph or telephone office who, without the authority or consent of the person to whom the same may be directed, willfully opens any sealed envelope enclosing a telegraphic or telephonic message, addressed to another person, with the purpose of learning the contents of such message, or who fraudulently represents another person and thereby procures to be delivered to himself any telegraphic or telephonic message addressed to such other person, with the intent to use, destroy, or detain the same from the person entitled to receive such message, is punishable as provided in Section 637.

Cal. Pen. Code § 637.2. *Civil action by person injured; injunction*

(a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:

(1) Three thousand dollars ($3,000).

(2) Three times the amount of actual damages, if any, sustained by the plaintiff.

(b) Any person may, in accordance with the provisions of Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, bring an action to enjoin and restrain any violation of this chapter, and may in the same action seek damages as provided by subdivision (a).

(c) It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damages.

* * *

Cal. Pen. Code § 851.5. *Right of person arrested to make telephone call*

(a) Any person arrested has, immediately after he is booked, and, except where physically impossible, no later than three hours after his arrest, the right to make, at his own expense, in the presence of a public officer or employee, at least two telephone calls from the police station or other place at which he is booked, one completed to the person called, who may be his attorney, employer, or a relative, the other completed to a bail bondsman.

(b) Any public officer or employee who deprives an arrested person of the rights granted by this section is guilty of a misdemeanor.

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1972

No. 72-290

STATE OF CALIFORNIA,
*Petitioner*

vs.

THOMAS HALPIN, REBECCA HALPIN and MARTIN SILVA,
*Respondents*

**On Writ of Certiorari to the Supreme Court of the State of California**

## BRIEF IN OPPOSITION

### STATEMENT OF FACTS[1]

A. On December 14, 1970, Respondent Thomas Halpin was arrested in Ontario, California, by San Bernardino County Sheriff's Deputies. At the time of his arrest, Halpin was driving a truck with a camper mounted on it, and while Halpin and the

[1]Respondents are satisfied with Petitioner's presentation of the Opinions Below, Jurisdictional Statement, Questions Presented, Constitutional and Statutory Provisions Involved, and with the Procedural Background aspect of the Statement of the Case. Rule 40(3).

truck were detained at the location where the arrest took place, a search warrant was obtained for the vehicle from a Magistrate upon the following oral showing:

A detective assigned to the San Bernardino County Sheriff's Department received a telephone call at approximately 8:05 on the morning of the 14th from a Pomona, California, Police Captain, who reported that he had been advised, at an unspecified time and by an unnamed informant, that on a Havasu Trailer Company lot in Ontario would be found, next to a blue Chevrolet, a white 1971 Ford Sport Custom truck with a dark green roof, mounted with a ten-and-a-half-foot camper, and bearing temporary license number 1291208. The informant further advised that a six-foot, 160-170 pound male with sandy hair, a moustache, horn-rimmed glasses and known only as "Tom" would be arriving on a flight from San Diego, again at an unspecified time, to pick the truck up. No information of a more personal nature, such as the man's age or a description of the clothing he would be wearing was furnished, but the informant did advise that the truck would have a false type body which would contain approximately $100,000 worth of marijuana. The record is devoid, however, of any statement by the informant as to the source of his information or the basis for his conclusions.[2]

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[2]The record does reflect that the informant furnished information on one prior occasion to the Pomona Police Department, and that an arrest and search predicated thereon resulted in the discovery of a large quantity of marijuana. That fact, however, has no bearing on the validity of the informant's conclusion in this case that the vehicle he described would contain marijuana.

Inspired by the rather meagre report thus obtained, Ontario Sheriff's deputies drove to the lot in question, which was open to the public, and determined that a truck fitting the informant's description was in fact parked there, in plain view, next to a blue Chevrolet. A surveillance was thereupon established in the area, and at approximately 11:30 a.m., a Volkswagen automobile pulled into the lot containing a man (Respondent Thomas Halpin) a woman (Respondent Rebecca Halpin) and a small child. The man fit the unremarkable description furnished by the informant, but since the car had a San Diego firm advertised on the license plate bracket, it was reasonably apparent that Respondent had not, as predicted by the informant, "arrived on a flight from San Diego."[3]

Halpin exited the automobile, went into the trailer company office, remained a short while and then returned to his car and drove away. At no time during this visit did he approach the truck.

Surreptitiously followed by deputies, the Halpins drove to a nearby resort area where they frolicked in the snow for two hours, an activity which could hardly be described as criminally oriented.

At approximately 2:30 p.m., the Volkswagen with its three occupants returned to the camper lot, and

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[3]Had Halpin in fact come by plane, one would expect that he would thereafter be travelling in an automobile bearing indicia of local origin. Moreover, it should be noted in any case that as far as the record reflects, no effort was made to conduct a surveillance or other investigation at the local airport. As represented at the hearing on the Motion to Suppress, only two flights per day arrived in Ontario from San Diego, and it would thus have been a simple matter to determine whether Respondent Halpin arrived on one of them.

this time Thomas Halpin innocently got into the truck, by himself, and drove off. The deputies followed the vehicle for a short distance and then pulled it over. Halpin exited the truck, shut and locked the door behind him, and was immediately placed under arrest. He declined to permit the deputies to search the vehicle, but under compulsion submitted to a search of his person, which produced identification bearing the name "Thomas Allan Halpin."

B. After the search warrant was obtained, Halpin was transported from the location where he was arrested to the Sheriff's West End Substation, where he was given permission to make the familiar one telephone call. He furnished a San Diego number to a deputy, who placed the call for him, but unbeknownst to Halpin or his wife, who received the call, the entire conversation was monitored and taped, although at the point Halpin had been formally accused of nothing and had not been taken before a magistrate. The tape was subsequently played before a Grand Jury, and provided the only evidence that may be thought to be of any substance with respect to Respondent Rebecca Halpin.

The statute which authorized the phone call provides that the call is to be made "in the presence of a public officer or employee," Calif. Penal Code, Section 851.5, but the record is silent as to whether any deputies were in fact in Halpin's immediate presence while he spoke with his wife, and no effort was ever made by the Petitioner herein to establish on a factual basis that Respondent Thomas Halpin waived his Constitutional and statutory rights to privacy.

## REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

### I

### THE SEARCH WARRANT ISSUE POSED BY PETITIONER IS NOT A SIGNIFICANT ONE

Petitioner contends that the Supreme Court of California misunderstood the two-pronged test of *Aguilar v. Texas,* 378 U.S. 108 (1964) as illuminated by the decisions rendered in *Draper v. United States,* 358 U.S. 307 (1959) and *Spinelli v. United States,* 393 U.S. 410 (1969) and, for that reason, erroneously concluded that the search warrant in issue failed to meet Constitutional standards.

It cannot seriously be disputed that the search warrant did not, as *Aguilar* requires, inform the magistrate about any of the underlying circumstances that led the informant to believe that the marijuana was where he claimed it was, *Aguilar v. Texas, supra* (378 U.S. at 114). But, says Petitioner, that should not necessarily be controlling because in Petitioner's view, a reasonable inference of reliability with respect to the informant's conclusion might have been drawn from the rather insignificant details with which the magistrate was furnished.

This Court, then, is being asked to grant certiorari to resolve Petitioner's doubts regarding the ability of a California Supreme Court unanimous in its conclusion to make reasonable inferences from factual detail.

Petitioner briskly dispatches the issue upon which certiorari is actually sought in order to apprise the Court of the allegedly "larger" issue that might be

obscured by the transparently exiguous one. The "larger" issue, we are told, is the necessity immediately to resolve the uncertainty created by the *Aguilar-Spinelli-Draper* trilogy. (Petition for Writ of Certiorari, pp. 16-18) If such an uncertainty needs resolution then it must appear in a case unlike this one. An "uncertainty" plea has a hollow ring when this Court is asked to review a unanimous conclusion of the California Supreme Court that does no more than apply that Court's three-year-old decision in *People v. Hamilton,* 71 Cal.2d 176 (1969), a decision which Petitioner understandably neglects to refer to.

If one imagines a case which meets all the criteria for not appearing on this Court's docket it is, we think, one in which this Court is asked to review a State Supreme Court's determination of the inferences to be drawn from factual detail in order to give unambiguous guidance in applying its own precedent of three years standing.

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## II

### THIS CASE PRESENTS NO SIGNIFICANT QUESTION ABOUT THE PREEMPTION SECTION OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

The court below simply applied the clear language of 18 U.S.C. §§2510-20 to the facts at hand. There was no warrant (or even statutory authorization for a warrant): Therefore, the eavesdropping was prohibited. There is no question here of implied pre-

emption, the Federal statutes expressly preempt the field. All a state need do in order to engage in statutorily valid electronic eavesdropping is adopt the prescribed procedures.

But, says Petitioner, Congress has gone too far: it lacks the power to control eavesdropping on telephone communications where communications from a jail to an outsider are concerned; Congress has invaded powers secured to the states by the Tenth Amendment.

Petitioner, once again, asks a lot of this Court in a case which, factually, cannot support the novel ruling which is sought. Asking this Court to hold that Congress's interstate commerce powers do not extend to telephone lines is asking this Court to ignore all reason and precedent. It seems inordinately ambitious to request such a departure in a case in which the telephone line in question was being used by a person in custody who: a) had neither been formally charged nor convicted of any crime; b) had not yet been taken before a magistrate to be advised of his rights and to have bail fixed; c) was exercising his statutory right to make a telephone call for assistance following his arrest; d) was talking to his wife, with whom his communications were privileged, and e) had not been let in on the fact that there were uninvited listeners on the line.

The last point seems particularly critical. If the state is worried about jail security then it need merely inform all persons using its jail phones that

the conversations will be listened to. Interposing the Tenth Amendment against congressional interstate commerce powers is hardly necessary.[4]

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## CONCLUSION

For all the reasons mentioned, Respondents respectfully urge that the Petition for Writ of Certiorari should be denied.

Dated, October 6, 1972.

Respectfully submitted,

PAUL G. SLOAN,
PAUL N. HALVONIK,
FRIEDMAN, SLOAN & HALVONIK,
ANTHONY GLASSMAN,
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[4]We realize that Petitioner maintains that consent to an eavesdrop implicitly existed by virtue of California Penal Code §851.5. (Petition for Writ of Certiorari, pp. 22-24) We doubt that the California Supreme Court would have found merit in the contention had it been raised at a point earlier than the petition for rehearing below but, in any event, the construction of a California statute is a question for the California Courts.